



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 320 OF 2018

TIDAL LOGISTICS LIMITED.....1ST PETITIONER/1ST APPLICANT

ACCESS AFRICA LOGISTICS LIMITED..2ND PETITIONER/2ND APPLICANT

RUMAN LOGISTICS LIMITED.....3RD PETITIONER/3RD APPLICANT

DOT COM CONSULTANTS LIMITED.....4TH PETITIONER/4TH APPLICANT

COASTAL FREIGHTERS E.A. LIMITED....5TH PETITIONER/5TH APPLICANT

-VERSUS-

KENYA BUREAU OF STANDARDS.....1ST RESPONDENT

HONOURABLE ATTORNEY GENERAL.....2ND RESPONDENT

RULING

[Applicants' Notice of Motion dated 26th November, 2018]

1. By a Notice of Motion application dated 26th November, 2018 supported by the affidavit of Suleiman Issa Hussein of 22nd November, 2018, Tidal Logistics Ltd, Access Africa Logistics Ltd, Ruman Logistics Ltd, Dot Com Consultants Ltd and Coastal Freighters E.A. Limited seek to set aside the consent recorded between them and the 1st Respondent, Kenya Bureau of Standards and adopted by this Court on 6th November, 2018. The consent directed the 1st Respondent to release the applicants' consignments being edible vegetable cooking oil products and allow their re-shipment to any part of the world except member states of the East Africa Community.

2. It is the applicants' case that in entering the consent the main objective was to minimize loss in terms of demurrage costs, warehouse charges, storage and other charges associated with the consignments at the port of entry. The applicants' averment is that the 1st Respondent has not issued the lab test results which is a condition precedent for reshipment to any part of the world rendering the consent meaningless. The applicants are therefore apprehensive that massive losses will be visited upon them which would result in economic ruin since the consignments are due to expire in less than a year.

3. In response, the 1st Respondent filed a replying affidavit sworn on 7th February, 2019 by its acting Company Secretary Luis Rasanga. He deposed that the 1st Respondent is mandated to inspect and where necessary test all products imported into Kenya to ascertain if they conform to the requisite Kenyan and East African standards before they can be released into the market. He further averred that any products that fail to comply with the set standards ought to be destroyed or re-shipped out of the country.

4. It is the 1st Respondent's case that the applicants imported consignments of edible vegetable oil into the country and upon inspection and testing, part of the consignments failed to conform to the set standards. The 1st Respondent thereby directed the applicants to re-ship the same out of the country leading to the filing of this petition by the applicants which later ended in a consent order between the applicants and the 1st Respondent determining the petition in its entirety save for the issue of costs. It is averred that the non-conforming consignments should have been re-shipped to some other destination a long time ago but the applicants have refused, ignored and/or neglected to implement the terms of the said consent order. It is also averred by the 1st Respondent that in any event the applicants have not satisfied the conditions for setting aside a consent order.

5. I have carefully considered the grounds upon which the application is based, the parties' rival affidavits and submissions and it is my view that the issue the court is called upon to decide is whether the applicants have met the conditions for setting aside a consent order.

6. The law pertaining to setting aside of consent judgments or orders is that a court of law can only set aside a consent judgement in circumstances such as would provide a good ground for varying or rescinding a contract. To impeach an order or judgment reached through consent, it must be demonstrated that it was obtained by fraud, or collusion or through an agreement contrary to the policy of the court.

7. One of the cases in which the law was stated is that of **Samuel Mbugua Ikumbu v Barclays Bank of Kenya Limited [2015] eKLR** where the Court of Appeal held that:

“The law on variation of a consent judgment is now settled. The variation of a consent judgment can only be on grounds that would allow for a contract to be vitiated. These grounds include but are not limited to fraud, collusion, illegality, mistake, an agreement being contrary to the policy of the court, absence of sufficient material facts and ignorance of material facts.”

8. In an article titled “Setting Aside” appearing in the New Law Journal on 1st March, 2013 (newlawjournal.co.uk), Margaret Hatwood writes that:

“A consent order can only be set aside in limited circumstances. These are: non-disclosure; fraud or misrepresentation; supervening events which invalidate the whole basis of the order; and undue influence.”

9. The applicants, through their counsel James Orenge, SC, argue that the application for setting aside the consent order is based on the complexity of the procedure for reshipment yet the consignments contain edible vegetable cooking oil products which are perishable and require expeditious action on the part of the 1st Respondent. He further submits that prior to the goods coming into the country, they were subjected to pre-export verification inspection and were even inspected by the 1st Respondent's agents in the country of origin. He also submits that, the goods were marked with the diamond quality mark at the country of origin which confirms that the goods conform to the Kenyan standards. According to counsel, the consent was made on the understanding that the goods would be released with the necessary papers for reshipment but that has not been the case since the products still have to undergo another inspection before leaving the country. He asserts that the inspection has taken over 80 days without formal communication from the 1st Respondent thereby frustrating the consent.

10. The 1st Respondent on the other hand argues that there are reshipment procedures in place which require to be observed and the 1st Respondent being a statutory body can only do that which is permitted by the law. Therefore, it matters not that the goods were inspected at the country of origin. It is the 1st Respondent's case that it has an obligation to take all the consignments through a meticulous process of testing and inspection to ascertain their status and that process cannot be rushed due to the existence of a consent order. They further contend that the consent order did not provide a timeline within which goods ought to have been released for re-shipment.

11. I have gone through the record and more particularly the proceedings of 6th November, 2018 when the consent in question was recorded and I agree with the 1st Respondent that there were no timelines set out in the consent order. I also find that the consent was not obtained by fraud, or collusion or by an agreement contrary to the policy of the court.

12. What the applicants are alleging is a delay on the part of the 1st Respondent in executing the consent order. The 1st Respondent's position is that the applicants are the ones frustrating the implementation of the terms of the consent. It is the 1st Respondent's position that it has not refused to issue certain results. Further, that the applicants have not adhered to the established procedures so as to get whatever they seek from the 1st Respondent.

13. The averments made in support of the allegation that the 1st Respondent has frustrated the execution of the consent, as found in the affidavit sworn in support of the application, are as follows:

“5. THAT before reshipment is undertaken the Kenya Bureau of Standards is expected to issue the results of all the consignments.

6. THAT the Kenya Bureau Standards has not issued the laboratory test results and therefore making it difficult to clear the Petitioners'/Applicants' consignments for reshipment to any part of the world as provided for in the consent dated 6/11/2018.

7. THAT the 1st Respondent has imposed a lot of unnecessary processes and bureaucracy in the course of clearing the consignments for reshipment and thus frustrating the said process.

8. THAT due to the frustrations and bureaucracy in the process of reshipping the consignments and considering the expenses being incurred on a daily basis, it's only fair that the consent be varied and/or set aside to allow the full Petition to be canvassed wholesomely.

9...

10. THAT the consent dated 6/11/2018 is therefore meaningless as its main objective has not been achieved as the process is too tedious and has been frustrated by the 1st Respondent.”

14. Going through the averments it becomes clear that the applicants' statements are not supported by any evidence. The applicants have not

tabled any documents to show that they have commenced the process of having the consignments reshipped. The applicants are the ones supposed to initiate the process of re-exporting the goods. Such a process is expected to be documented. The applicants have not even produced any document about the alleged laboratory tests whose results are being awaited. Had the applicants placed evidence before me to show that the implementation of the consent is being blocked by the 1st Respondent then I would not have hesitated in setting aside the consent on the ground that intervening events have made the consent impossible to implement.

15. The consent was recorded on 6th November, 2018 and the instant application was filed on 26th November, 2018. Hardly three weeks had passed from the date of the recording the consent before the applicants moved the court to set aside the consent. There is nothing to show that the applicants attempted to have the consent implemented. The impression I get is that that the applicants developed cold feet after entering the consent. This Court cannot help them to turn their backs on a consent they voluntarily signed.

16. From what I have already stated, it follows that this application is without merit. The same is dismissed with costs to the 1st Respondent.

Dated, Signed and Delivered at Nairobi this 28th day of March, 2019

W. Korir,

Judge of the High Court